UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

XPO LOGISTICS FREIGHT, INC.

Employer

and Case 13-RC-184190

TEAMSTERS LOCAL UNION NO. 179

Petitioner

ORDER

The Employer's Request for Review of the Regional Director's Decision and Certification of Representative is denied as it raises no substantial issues warranting review.[1]

MARK GASTON PEARCE, MEMBER

LAUREN McFERRAN, MEMBER

Dated, Washington, D.C., April 6, 2017

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[1] Contrary to our dissenting colleague, we find that the Employer did not establish any basis under Sec. 102.67(d) of the Board's Rules and Regulations, let alone a compelling one, for reversing the Regional Director and granting its Request for Review. To the contrary, the Employer's evidence in support of its objections fails to "constitute grounds for setting aside the election if introduced at a hearing" under Sec. 102.67 (c)(1)(i). See also, *Park Chevrolet-Geo, Inc.*, 308 NLRB 1010, 1010 fn. 1 (1992) (employer failed to "present evidence that raises substantial and material factual issues," warranting a hearing); *Cumberland Nursing & Convalescent Center*, 248 NLRB 322, 323 (1980) ("Simply put, it is not enough for the objecting party's evidence merely to imply or suggest that some form of prohibited conduct has occurred.").

Thus, as to Objection 1, the Employer neither identified the alleged Union agents or supporters who purportedly threatened employees into supporting the Union nor specified the objectionable statements they assertedly made. Contrary to the Employer, a hearing is *not* warranted so that it can subpoena evidence in an effort to uncover conduct that it has failed to sufficiently allege. Hearings on objections are not discovery tools. And, as to Objections 2 and 4, the Employer's offers of proof failed to support its claim that the alleged conduct was attributable to an agent of the Union. Additionally, the alleged conduct by Union supporters, if proven, is insufficient to create an atmosphere of fear and reprisal warranting setting aside the election. See, e.g. *Hood Furniture Mfg*. Co., 297 NLRB No. 51 (1989), enfd. 941 F.2d 325, 329 (5th Cir. 1991); *Accubilt, Inc*., 340 NLRB 1337, 1338 (2003).

Contrary to our dissenting colleague, the deficiency in the Employer's objections stems not from its failure to submit a voluminous offer of proof, but from the Employer's failure to allege and support conduct which, if credited, *would* warrant setting aside the election. NLRB Casehandling Manual (Part Two) Representation Sec. 11395.1. Accordingly, we deny the Request for Review.

Acting Chairman Miscimarra, dissenting in part.

Contrary to my colleagues, I would grant the Employer's Request for Review with respect to the Regional Director's decision to overrule, without a hearing, Objection 1, which alleges Union supporters and agents harassed employees, Objection 2, which alleges a vocal pro-Union employee told another employee to "go fuck [him]self," and Objection 4, which alleges pro-Union agents "got in [the] face" of an employee who disposed of Union literature. At present, the Board cannot assume that Employer Objections 1, 2 and/or 4 have merit. However, unlike my colleagues, I believe the Employer's objections sufficiently raise factual issues warranting a hearing with respect to these matters.[2]

Objection 1 alleges threats and/or coercion of employees, intended to force employee support of the Union. In support of this objection, the Employer identifies, by name, eight employees who reportedly will testify they were repeatedly harassed by vocal Union supporters and agents, both at the Respondent's facility and their homes. The Regional Director stated that the Employer's offer of proof was insufficient because it did not identify the Union supporters or agents who allegedly made the statements or specify what those statements were. Objection 2 alleges threats, intimidation, and/or coercion of employees during work hours, intended to force employee support of the Union. In support of this objection, the Employer identifies, by name, an employee who reportedly will testify he was intimidated by a named Union supporter attempting to influence the election. Specifically, the Union supporter reportedly stated that the employee should "go fuck [him]self" and provoked arguments with other employees so as to intimidate voters. The Regional Director stated that the Employer's offer of proof does not give context for the conversation between the employee and Union supporter and was insufficient to establish the statements as threats. Objection 4 alleges threats, intimidation, and/or coercion of an employee in the exercise of his Sec. 7 rights with respect to discarding Union flyers. In support of this objection, the Employer identifies, by name, an employee that reportedly will testify he was intimidated by two named Union agents for discarding Union literature and provides an unsworn statement from the employee. Specifically, the Union agent reportedly "got in [the] face" of the employee in a break room. The employee reportedly informed other employees of this allegedly threatening altercation prior to the vote. The Regional Director found that the Employer's offer of proof was again insufficient to establish the statements as threats.

In my view, a party's offer of proof need not present a voluminous narrative to warrant a hearing. Rather, as explained in the dissenting views set forth in the Board's Election Rule, 79 Fed. Reg. 74308, 74446 (December 15, 2014) (dissenting views of Members Miscimarra and Johnson), I believe an offer of proof "is an informal short-form description of potential evidence." Pursuant to the NLRB Casehandling Manual (Part Two) Representation Sec. 11395.1, "a hearing should be held if the objecting party has established that it *could* produce at a hearing evidence which, if credited, *would* warrant setting aside the election (emphasis added). The Board has found that an objecting party "may satisfy its burden by specifically identifying witnesses who would provide direct rather than hearsay testimony to support its objections, specifying which witnesses would address which objections." *Transcare New York, Inc.*, 355

[2] I agree that the Employer has not established grounds for review of the Regional Director's decision to overrule Objections 3, 5, and 6.

NRLB 326, 327 (2010). See also *Heartland of Martinsburg*, 313 NLRB 655, 655 (1994) (finding that the Board's rules do not require that the objecting party's evidence "include signed witness statements or affidavits"); *The Holladay Corp.*, 266 NLRB 621, 622 (1983) (Board found fact that Employer "provided the names of two employee witnesses who … would substantiate the[] allegations" to be "critical[]"). Although the Employer's offer of proof here does not describe the alleged misconduct with the type of detail that one would expect in actual hearing testimony, the offer identifies by name *nine* employee witnesses who, according to the Employer, will provide direct testimony of the alleged misconduct. While the Regional Director and the Board may ultimately conclude that the Objections have no evidentiary support, I believe the Employer's proffer identifying these witnesses, together with the summary of their expected testimony described above, suffices to warrant a hearing with respect to Objections 1, 2, and 4. Accordingly, I believe that the Employer has identified substantial issues regarding its Objections 1, 2 and 4 that warrant review, and I would remand this case to the Region for the purpose of conducting a hearing as described above.[3] See, e.g., *Trimm Associates, Inc. v. NLRB*, 351 F.3d 99, 106 (2003) (internal citation omitted) ("[T]he question before the Board is not whether the objecting party can show that it will ultimately be able to prove its case, but only whether there has been a sufficient showing, given the inherent constraints on discovery, to raise a substantial and material issue of fact that, if resolved favorably to the objecting party, would warrant setting aside the election.")

Furthermore, although I agree with the Board's standard set forth in *Tampa Crown Distributors, Inc.*, 118 NLRB 1420, 1421 (1957), for determining whether third-party threats warrant setting aside an election, I would abandon the phrase "general atmosphere of fear and reprisal" because it improperly suggests that an election cannot be set aside unless third-party threats affected nearly all eligible voters, no matter how close the tally and how serious the misconduct. See *Mastec Direct TV*, 356 NLRB 809, 813-815 (2011) (Member Hayes, dissenting). Contrary to the implication of the phrase, the Board has in fact properly set aside elections based on serious third-party misconduct affecting only a few determinative voters. See *Robert-Orr Sysco Food Services*, 338 NLRB 614 (2002); *Smithers Tire*, 308 NLRB 72 (1992); *Buedel Food Products Co.*, 300 NLRB 638 (1990); *Steak House Meat Co.*, 206 NLRB 28 (1973).

PHILIP A. MISCIMARRA, ACTING CHAIRMAN

[3] It is noteworthy that this election was resolved by a vote of 38 to 33, with two non-determinative challenged ballots. The fact that a three vote "swing" could have changed the outcome of the election further warrants remand for a hearing on the misconduct alleged in Objections 1, 2 and 4. See *Cedars-Sinai Medical Center*, 342 NLRB 596, 598 (2004). More generally, as indicated in the text, I disagree with the Board's Election Rule for the reasons expressed in the dissenting views jointly authored by former Member Johnson and me, see 79 Fed. Reg. 74308, 74446 (December 15, 2014) (dissenting views of Members Miscimarra and Johnson), and I would also grant review to the extent that the Regional Director relied on the Election Rule in denying the request for a hearing in the instant case.